

The "Fourth Stream": the power of hidden participants to implement policy with the aid of the high courts

Swan, Robert

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Swan, R. (2004). The "Fourth Stream": the power of hidden participants to implement policy with the aid of the high courts. *Federal Governance*, 1(1), 1-28. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-47047-3>

Nutzungsbedingungen:

Dieser Text wird unter einer Basic Digital Peer Publishing-Lizenz zur Verfügung gestellt. Nähere Auskünfte zu den DiPP-Lizenzen finden Sie hier:
<http://www.dipp.nrw.de/lizenzen/dppl/service/dppl/>

Terms of use:

This document is made available under a Basic Digital Peer Publishing Licence. For more Information see:
<http://www.dipp.nrw.de/lizenzen/dppl/service/dppl/>

THE “FOURTH STREAM”

The Power of Hidden Participants to Implement Policy with the Aid of the High Courts

Robert Swan¹, Portland State University

Introduction

Due to financial constraints and a lack of bed space caused by a large influx of inmates over the last decade, the Oregon Department of Corrections has been utilizing penal policy that – in one form or another – involves the interstate import and export of prisoners. However, in order to transport, exchange or “lease” inmates to states, the Oregon Department of Corrections must utilize the Federal Interstate Compact Act, and in so doing, has entered into various interstate corrections compacts.² The original purpose of the Federal Interstate Compact has evolved over time and the actual legal authority allowing Oregon to transfer inmates to out-of-state prisons is quite murky. Similarly, though it appears that the evolution of interstate compacts allowing the interstate transfer of prisoners has primarily been propelled by high court decisions, the role of legislation is less clear. It is apparent, however, that the nature and original purpose of the interstate compact has evolved over time due to court rulings pertaining directly to the states’ use of the interstate compact for inmate export and/or exchange.

As I shall argue, though, the Oregon Department of Corrections, directly through court ruling, or indirectly through legal precedent, utilizes a “fourth stream” policy formation process that is heavily dependant on the court as a policy formation partner. It is also clear that the interstate transfer of prisoners in Oregon, as well as the funding of new prison construction in Oregon, is being achieved outside of both the democratic

¹ Robert Swan is a Ph.D. candidate in Public Administration and Policy at Portland State University.

² See Appendix A regarding the involvement and support of other states and interest groups for Interstate Corrections Compacts.

process and the three policy formation channels described by John Kingdon. Simply stated, Oregon administrators aggressively utilize the high courts in their search for the acceptance and legitimization of faulty and socially unacceptable penal policy as they seek to alleviate prison overcrowding and/or to manage and punish inmates. Thus, a “fourth stream” in the policy formation process is being utilized – a process which has led to a great deal of what we might call “administrative evil” (Adams & Balfour, 1998), i.e.,

[The] needless human suffering directly caused by the operation of administrative processes in which the manner used and the ethical implications of the ends they served have been severed while the ethical import of the means themselves is also treated by administrative actors as irrelevant (Bud Kass, personal communication, March, 2002).

Perhaps in identifying and labeling administrative evil as “banal,” Hannah Arendt (among numerous others) has mischaracterized a process that is far from “routine” (Miller, 1998). As Bernard Williams notes, “the modern world...has made evil, like other things, a collective enterprise” (pp. 1-4). Similarly, as John Kingdon (1995) asserts, the contribution of administrative specialists in the policy formation process is often far from routine and very often an aggressive and collective enterprise. In this paper, one of my concerns is with how administrators are able to develop and implement highly destructive social policy while working in collaboration with the high courts. Specifically, I focus on how administrators in the Oregon Department of Corrections are able to utilize Interstate Compact agreements to both individually punish inmates and to reduce the fiscal impact on the organization caused by an exponentially growing number of inmates. I also investigate the role the high courts play in legitimating what would seem to be rather patently unconstitutional penal practices. Simply stated, I argue that a “fourth stream” policy formation process exists in which the courts uphold and legitimate the activities

and wishes of “hidden participants” (Kingdon) – a process that is missing from John Kingdon’s “three-stream” model of policy formation. This “fourth stream” in the policy formation process is the product of communities of specialists who are able to legitimate the implementation of faulty policy ideas. As I will show, it is through the high court system that hidden participants are able to gain support and legitimacy for a number of fiscally and socially irresponsible corrections policies that often remain hidden from the public, elected officials and other democratic stakeholders. In short, faulty policies that would normally be “culled” in the other policy streams are given new life by the high courts.

In order to show how the courts play a critical role in the formation of corrections policy in Oregon, as well as on the national level, I have divided this paper into five sections: a description of Kingdon’s “three streams” agenda setting and policy formation model; a description of the Oregon Department of Corrections and the needs that drive hidden participants to create new policy; a description of Interstate Compacts and the evolution of their purpose; a summary of court cases directly related to the evolution of Interstate Compacts and the underlying rationale for the courts to act as a “fourth stream” in the policy process; and a concluding summary of my findings. It is through this case study of Oregon Department of Corrections and their use of interstate compacts that I hope to show that not only is administrative evil very rarely banal or routine, but that the intentional, entrepreneurial actions and faulty policy proposals of hidden corrections participants can be legitimated solely by the high court in a “fourth stream” policy formation process. In short, I am proposing that the relationship between public administrators and the high courts constitute an important “stream” in the policy

formation process that, though overlooked by Kingdon, surely has not been overlooked by administrators in the Oregon Department of Corrections.

Kingdon's "Three Streams"

Kingdon (1995) describes the "three streams" involved in agenda setting and policy formation or change as: problems, politics, and policies. In a simple description, Kingdon explains the operation of these policy streams in this way:

People recognize problems, they generate proposals for public policy changes, and they engage in such political activities as election campaigns and pressure group lobbying. Each participant...can in principle be involved in each process...In practice, though, participants usually specialize in one or another process to a degree (p.197).

Problems, according to Kingdon, occupy the attention of government officials based on "the means by which those officials learn about conditions and in the ways in which conditions become defined as problems" (p.197). Thus, indicators – such as incidence of disease – are used to gauge how important the condition is and work in conjunction with focusing events such as a disaster, crisis, or the personal experience of an official. Importantly, it is the way officials learn about a condition that may raise it to the level of a problem in their mind. That is, convincingly defining a condition as a problem is what ultimately makes a condition a problem for policy makers (e.g., letters to a Congressperson, etc.) (p.197-98).

Politics, in Kingdon's model, is the second stream in the policy formation process in which "explanations for high or low agenda prominence" can be explained (p. 198). As Kingdon asserts, "Political events flow along according to their own dynamics and own rules," and thus should be considered a separate process in which ideas are processed (p. 198). In this stream, consensus is reached through bargaining more often than through persuasion – though powerful visible policy makers (e.g., the President) can

often place their agenda item at the top of the list with little negotiation or the need to be overly persuasive (p.199). As Kingdon asserts about the political stream, “The combination of national mood and elections is a more potent agenda setter than organized interests” (p.199).

The third policy stream, according to Kingdon, is best seen as a sort of “biological natural selection” where many ideas are present but only the strongest survive (p.200). Important in this third stream of the policy formation process is the way in which “order is developed from chaos” through alternative specification, or rather, through policy “alternatives, proposals and solutions” that are generated by narrow communities of specialists (p.200). Thus, and as Kingdon asserts, the criteria for judging an idea “include technical feasibility, congruence with the values of community members, and the anticipation of future constraint, public acceptability, and politicians’ receptivity” (p.200). However, though Kingdon asserts that policy ideas that do not meet these criteria do not often survive, I will argue below that there is a fourth stream in which communities of specialists are able to legitimate the implementation of faulty policy.

Simply then, according to Kingdon, if we are to understand how agendas are set and/or public policy altered, it is useful to conceptualize three streams of competitive political discourse in which agendas and/or policy alterations are developed or recognized, tested, rejected, modified, and/or implemented. Important to the potential success or failure of an agenda item or policy change, asserts Kingdon, is the coupling or uncoupling of the agenda item in one policy stream to another. That is, “a complete linkage” of the policy idea in all three streams into a “single package” will most likely ensure the success of that idea. In describing this process, Kingdon writes:

[...] Entrepreneurs concerned about a particular problem search for solutions in the policy stream to couple to their problem, then try to take advantage of political receptivity at certain points in time to push the package of problem and solution (Kingdon, p.202).

In addition to these three processes, Kingdon describes the role of visible participants (e.g., the President, Congresspersons, etc.) and hidden ones (e.g., scholars, analysts, administrators, etc.) in these processes as well as the narrowing of potential policy alternatives by hidden participants through alternative specification. Simply, he describes alternative specification by hidden participants as the winnowing and discarding of faulty policy alternatives by a narrow group of specialists. Although the impact of visible participants on policy is important, the focus of this paper is on the impact – often aided by the high courts – which hidden participants have on public policy. Understanding the fact that not all faulty policy is “winnowed” out, and in fact, is often used as policy of last resort, is key to understanding the fourth policy stream. Similarly, understanding the high court’s role in sustaining faulty or destructive penal policy – developed and implemented by hidden participants – that should have been culled in the policy stream by relevant experts, academics, and specialists is also significant.

Oregon’s Problem: Full Prisons and a Lack of Money

In the 1990’s, Oregon was on the horns of a dilemma: build more prisons at great public expense or continue to send prisoners out of state to low-bidding private or public prisons? Oregon administrators were (and are) willing and able to do both. Through very creative financing and inmate export strategies, supported by numerous high court rulings, Oregon administrators have and continue to be able to implement policy

strategies that would normally be culled in one of the policy streams explicated by Kingdon.

Much of the current literature describing the organizational behavior of prisons and jails is focused on one concern: overcrowding. That is, the behavior of corrections officials and administrators is determined by their need to either increase their inmate holding capacity and/or otherwise increase their ability to manage a rapidly growing number of inmates (Segal, 2001; U.S. Department of Justice, 1991 & 2000). Through numerous and creative policy ventures, Oregonian administrators have continued to find policy solutions that “work” in the short term but have failed to find an affordable, humane, long term solution to the problem of overcrowded prisons. One of the practices preventing Oregonian administrators from developing a more humane solution to prison overcrowding (e.g., putting pressure on the legislature to go easy on its “get tough on crime” focus) is the “modified” use of Interstate Compacts for inmate export. The court’s acceptance of a state’s right to use interstate compacts as a way to punish or shuffle inmates between jurisdictions has given corrections administrators and other hidden participants an additional tool in their effort to manage overcrowding.

Oregon’s use of the high courts as a way to implement and experiment with faulty penal policy can not be fully explained without a brief description of Oregon’s need to manage a rapidly growing influx of inmates and the expenses incurred by this influx. That is, Oregon, like many (or most) other states, was faced with an exponentially growing number of prisoners in the last decade and did not have enough space to accommodate them all. As the Rockefeller Institute (Boyd & Jenny, 2002) asserts, between 1985 and 1990, corrections spending nationally grew at an 8.5% annual rate as the number of state prisoners skyrocketed and states began to build more prisons.

However, though real per-capita correction spending has slowed nationally, Oregon correction spending continues to grow at 7.4% per year (Boyd & Jenny 2002). Profoundly affecting this continued growth in both the adult and juvenile prison population in Oregon is Measure 11 – a law that determines minimum and lengthy sentences for a wide variety of violent or person-to-person crimes (Oregon Corrections, 2002; see Appendix A). As the Department of Corrections asserts, “Stricter sentences generate need for more trials, juries, prosecution/defense [spending] and bed space” (System Cause and Effect Relationships, ODC, 2002; see Appendix A). However, some corrections analysts do “like” Measure 11 because it promotes efficiency in the criminal justice system by allowing administrators to accurately predict future incarceration trends and by forcing the system generally to become more resourceful in managing its resources (see Appendix B). Measure 11 also forces the system to work outside of the normal democratic process in order to obtain the resources that it needs to manage an exponentially growing prison population. In summarizing the budget literature produced by the state of Oregon, it would seem that Measure 11 (ORS 137.700 and 707) which was passed by voters in 1995 and ORS 137.717 which was passed by the legislature in 1997 to mandate minimum sentences for property crimes, are the primary drivers for Oregon’s continuing need to expand penal capacity at the state and local level (see Appendix A). Unfortunately, the money needed to do this has not often been available and prison officials and administrators have had to be creative.

One approach to the problem of overcrowding in Oregon is to build more prisons. Unfortunately, the number of facilities and related services required to meet Oregon’s penal needs is quite expensive, and will in fact cost Oregonians \$100 million each biennium in debt service alone (Western Prison Project, 2002; see Appendix A). As both

Bridget Sarabi and the Oregon Department of Corrections note, the operating and construction budget for the next biennium (2001-03) comes to \$1.013 billion (Western Prison Project, March 2002; see Appendixes A & B). In an interesting and creative funding endeavor, Oregon is funding this massive prison construction project (8 new prisons – 25 per year in the 1990s alone) outside of traditional cash conduits (i.e., legislative appropriation; see Appendix A). In order to fund this massive prison construction project, Oregon utilizes Certificates of Participation (Western Prison Project; see Appendix A). COPs require no taxpayer approval, because technically they are not long-term debts. In fact, COPs are an “off-balance sheet” debt in that the state does not technically own the prison that is being constructed. Rather, Oregon leases prison space from private corporations and thus, the interest payment on construction debt incurred from prison construction is not considered a long-term debt (see Appendix A). Finally, though the money for this prison construction does not come out of the general fund, the \$100 million debt service due every biennium, as well as the cost of leasing the prison space, does – thus reducing the general fund by \$50 million dollars per year to pay for facilities that the state does not actually own. Interestingly, one of the private correctional facilities utilized by various state corrections agencies is currently under criminal investigation for a similar, off-books funding approach (Hallinan, 2002).

However, the use of COPs has been tested by the Oregon Supreme Court and, according to the Western Prison Project, is “under certain conditions ... legal” (2001, p.1; see Appendix A). Specifically, the court has ruled that in order for COPs to be legal, the state legislature has to be given the option to fund the debt service or not – the debt service payment cannot be mandated. Additionally, each set of COPs must be specifically approved by the legislature and must be managed by the State Treasurer’s

Office. However, though there are conditions to this rather creative financing approach to prison construction, it would seem that corrections administrators have successfully legitimated – through the high courts – a prison financing policy similar to the one that recently sank Enron (and millions of investors). Thus, it seems that hidden participants in this case, aided by the court and members of what Lilly and Deflem call the “punishment industry” (1996, p. 1-16), were able to develop fiscally irresponsible penal policy with very little oversight from the other policy streams involved in the policy process identified by Kingdon.

Massive prison expansion alone does not seem to be able to meet the penal needs of Oregon and administrators are using alternative and creative policy solutions. In the 1990’s, Oregon “sold”, or rather, made a number of “batch transfers” of its inmates to low bidding, out of state prisons willing to accept them (Sarabi, 2002; see Appendix B) – a practice which had separated families and subjected inmates to additional punishment (See Angola Prison example in Appendices A and B). After a number of abuses were publicly revealed, the Oregon legislature put a stop to this sort of “batch” transfer (Sarabi). However, Interstate Compact agreements still are a viable tool for Oregon’s administrators. That is, administrators can, per an agreement with a “compacting” state, send Oregonian prisoners out of state in order to minimize crowding or manage problem inmates – regardless of the emotional or physical trauma to an inmate or his or her family. For example, it seems that Oregon continues to send prisoners to Angola State prison in Louisiana (DeHaan, 2002; see Appendix B) – a prison notorious for its human rights violations. Similarly, as state Senator John Minnis (R) asserts, “Oregon is the largest net exporter of prisoners in the country” (Minnis, 2002; see Appendix B).

It is by closely scrutinizing the evolution and use of Interstate Compacts by Oregon's corrections administrators that we see how they (and other public administrators around the country) might utilize a "fourth stream" in the policy formation process. Simply, Oregonian administrators aggressively utilize the high courts in their search for the acceptance and legitimization of faulty and socially unacceptable penal policy as they seek to alleviate prison overcrowding and/or to manage and punish inmates. Furthermore, by looking at the evolution of Interstate Compacts, as well as Oregon's reliance on them, the role of the high courts in supporting the legitimacy of faulty policy becomes clear. It is also the place where hidden participants can be seen experimenting with socially or fiscally irresponsible penal policy that should have been culled in the main policy streams. Thus, by examining the evolution of the Interstate Compact and the high court's role in upholding the creative administrative applications of these compacts in a number of states, we can see the role of both the court and hidden participants in the "fourth stream" of policy formation.

The Evolution of Interstate Compacts

Interstate compacts are not new or unique. There are more than 200 interstate compacts in existence today and seventeen are Corrections and Crime control compacts (The Council of State Governments, 2002). The evolution of the Federal Interstate Compacts seems to have been propelled primarily by high court cases favoring hidden participants. That is, the courts have consistently sided with corrections administrators who have pushed the limits of the interstate compact to points not explicitly or even implicitly detailed in either one of the Federal Interstate Compact Acts. Before detailing the legal challenges to inmate export or trade, however, it is necessary to provide further background on interstate compacts.

The five pieces of legislation – to include the U.S. Constitution – that relate to the use of the interstate compacts in Oregon are: the Constitution (Friendly, 1984, p. 288-89); the 1937 Interstate Compact for the Supervision of Parolees and Probationers Act (Council of State Governments, 2002); the 1997 Interstate Compact for Adult Offender Supervision Act (Council of State Governments, 2002); and ORS 421.245 and Oregon HB 2393 (Oregon Legislative Assembly, 2001, enacted). The original 1937 Interstate Compact act was necessarily a federal act of Congress due to explicit constitutional constraints on interstate agreements (Friendly). However, many states have since successfully entered into a variety of interstate agreements – some of them modeled after interstate corrections compacts – that cover a wide variety of issues (e.g., energy, fire suppression, environmental, etc.) (Hogan, Hitt, & Schmidt, 1996).

The Original Interstate Compact Act of 1937, as well as the replacement Interstate Compact Act of 1997 do not explicitly allow for the exporting or trading of incarcerated inmates from one state to another. Rather, they merely allow for a legal exchange of services aimed at monitoring paroled offenders from different states. In essence, the Interstate Commerce Acts (1937 & 1997) allow – under specific conditions – paroled or probationary prisoners to travel from the state of conviction to another state participating in the compact. Additionally, the 1997 compact agreement allows law enforcement to travel to a compact state to pursue or expedite the extradition process (Minnis, see Appendix B). Similarly, Oregon’s HB 2393 (a simple boilerplate compact agreement signed by all compact states) merely makes the agreement between states more specific and stronger by, in part, allowing states to sue each other for breach of contract. However, ORS 421.245 (2001) does state explicitly that “confinement” can and will be shared among states. Thus, as the correctional needs of Oregon changed, so too did the

legislatures use and interpretation of the interstate compact tool. However, the use of the compact for interstate inmate exchanges and inmate exports by Oregonian administrators predates Oregon law by a number of years. The question as to who moved recently to make this change in Oregon law is rather murky, but it is clear that this policy innovation had been put forward and practiced by hidden participants within Oregon's corrections bureaucracy for years prior to codification – a practice fully sanctioned, and thus legitimated, by the higher courts.

The Courts and Interstate Compacts

Howard Gillman writes that courts are quite capable of partisanship and Randall Kennedy asserts that the courts can be downright corrupt (Gillman, 2001; Kennedy, 2001). However, Teri Peretti defends the court's right to be partisan (Peretti, 1999). In fact, Peretti asserts that a partisan court is necessary, and furthermore asserts that:

It is only through the exercise of its power, through judicial activism, that the court can give effect to its alternative representation and thereby add to or improve on the efforts of other institutions to achieve a meaningful consensus. (p.222).

Peretti also asserts that, "each institution has some degree of independent power, although not complete power, to force the inclusion of 'their' interests or constituency into the policy process" (p.222). Thus, courts as an institution interacting in a hyper pluralistic environment must act and/or make decisions based upon their own interests or, it would seem, the interests of other institutions it sees as being excluded from the policy process – especially those it sees as a "constituency," such as corrections. This is the reality that hidden participants utilize when pushing faulty corrections policy to the point that it is tested, and ultimately legitimated, in the high courts. In other words, Peretti has

explicated the underlying rationale for the courts to act as major players in a “fourth stream” process of policy formation.

There are a number of high court cases that show how the court has consistently upheld the actions of corrections administrators attempting to creatively and aggressively implement new and potentially destructive penal policy outside of the policy stream. However, the origins of inmate “sales,” exports, or trades are fairly murky and the origins of this practice do not reside in explicit law so much as it does in a variety of court decisions allowing the practice to continue. Having said that, it appears to me that the impetus for the wholesale transfer of prisoners across state lines may have originated with the Interstate Agreement on Detainers Act (Criminal Resource Manual, 2002). This act:

Applies to transfers of sentenced prisoners for unrelated trials between two states, and to transfers from the Federal Government to the States, and from the States to the Federal Government. It does not apply to transfers of Federal prisoners between the several judicial districts for trial on Federal charges. (p.1)

Simply, this was an act designed to allow for the transfer of prisoners wanted for trial between jurisdictions. However, though not yet allowing for the wholesale interstate transport or exchange of prisoners, this act was upheld by the Supreme Court and seems to have provided a starting point for future cases regarding the interstate transport or exchange of prisoners.

Olim v. Wakinekona (1983) is a case directly related to the legitimization of administrative policy created in a vacuum, or rather, away from the rationalizing forces of the main policy streams. In this case, the U.S. Supreme Court upheld the administrative practice of shipping “troublemakers” to out of state – indeed, “overseas” – correctional facilities. In an attempt to manage inmates designated as “troublemakers” by

administrators at Hawaii State Prison, these administrators implemented an interstate and overseas transfer of inmates to a California correctional facility. In supporting this policy innovation, the Supreme Court held (in part) that:

An interstate prison transfer does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself...[as an inmate] has no justifiable expectation that he will be incarcerated in any particular state. [...] Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other states...[n]or do Hawaii's prison regulations create a constitutionally protected liberty interest. Although a State creates a protected liberty interest [461 U.S. 238,239] by placing substantive limitations on official discretion, Hawaii's prison regulations *place no substantive limitations* on the prison administrator's discretion to transfer an inmate (pp.1-3).

In an interesting twist of legal reasoning, the Court also ruled in this case that, "even when, as here, the transfer involves long distances and an open ocean crossing, the confinement remains within constitutional limits" (p.2). Based upon this reasoning, one can only speculate on the future of policy innovations by prison administrators (e.g., the exporting of prisoners to third world prisons because they are cheaper).

In an Oregon case – *Ghana v. Pearce* (1998) – the Ninth Circuit Court of Appeals upheld Emory Ghana's transport from a New Jersey prison to the Oregon State Penitentiary and asserted in no unclear terms that an "alleged violation of the Interstate Corrections Compact does not support a prisoner's action (appeal) under 42 U.S.C. S 1983. According to this court, this transfer (and Oregon's corrections protocol) did not violate the Interstate Corrections Compact because the inmate had no right to question the Compact or its provisions in the first place. In part the court held that:

A state compact is transformed into federal law and thus may be the basis for a S. 1983 action, when it falls within the scope of the compact clause, has received congressional consent, and its subject matter is appropriate for congressional legislation. The Compact failed the third test... the Compact's procedures are therefore purely a local concern, and there is no federal interest absent some constitutional violation in the treatment of prisoners (pp. 3-4).

In *Slater v. McKinna* (2000), inmate Allen Slater complained that he was a prisoner of Washington State and should not have been sent to a private prison in Colorado. Furthermore, he claimed that he was entitled to release because the transfer was unlawful. The Colorado Supreme Court in this case held that section 17-1-104.5, 7 C.R.S. (1999), not the Interstate Corrections Compact or the Western Interstate Corrections Compact, governed Slater's transfer to a private facility in Colorado (p1). What is interesting in this decision is that the Colorado Supreme Court is basing its decision on state statutes governing contracting with other states rather than on Compacts authorized by the U.S. Congress. In other words, this court seems to be basing its decision on specious and unconstitutional grounds because, as Article I, Section 10 of the U.S. Constitution asserts, a state statute alone cannot authorize interstate commerce (e.g., inmate exchanges or trades). Perhaps in the most egregious case of a court supporting the poor policy choices of corrections administrators, the Colorado Supreme Court has shown that it will go to extra-legal lengths to support and legitimate "fourth stream" policy it agrees with – even though both the policy and the court's reasoning are constitutionally unsound.

Finally, in *Davis v. Hudson* (2000), Donald Davis asserts that the district court erred in rejecting his argument that he is in custody in violation of the Constitution of the United States "because his transfer from a state-operated prison in Wisconsin to a privately operated prison in Oklahoma violated his rights under the Eighth, Thirteenth, and Fourteenth Amendments" (p. 1). In essence, Davis is arguing, "Wisconsin law creates a liberty of interest in not being transferred to an out-of-state prison without the prisoner's consent" (p.1). However, the Tenth Circuit Court of Appeals held that "Wisconsin law, like the federal Constitution and statutes, does not automatically prohibit

non-consensual interstate transfer of prisoners, and therefore creates no cognizable constitutional liberty interest under the circumstances of this case” (p. 1). Calling Davis’ appeal “frivolous” (p. 2), the court dismissed his case and declined to grant him a certificate of appealability. Interesting in this case is the unwillingness of the court to recognize either state or Federal law as binding. In other words, by viewing state and federal law as fluid and subjective, they are opening the door to those administrators who view the “fourth stream” as the only way to legitimate poor policy. In this case, hidden corrections participants were again able to institutionalize poor penal policy simply because the court sympathized with their need to transport prisoners to out-of state private prisons.

Conclusions, Findings and Outlook

As John Kingdon asserts, the contribution of administrative specialists in the policy formation process is often far from routine and very often an aggressive, collective enterprise. However, the collective enterprise identified in my case study shows only that public corrections administrators and the courts work together to create public policy with very little (if any) input from the policy process streams identified by Kingdon. Clearly, it is through the high court system that hidden participants are able to gain support and legitimacy for a number of fiscally and socially irresponsible corrections policies that often remain hidden from the public, elected officials, and other democratic stakeholders. In short, faulty policies that would normally be “culled” in the other policy streams are given new life in the fourth stream by the high courts. Simply stated, there is a “fourth stream” policy formation process at work in Oregon and nationally in which the courts uphold and legitimate the activities and wishes of hidden participants – a

process that I found to be missing from Kingdon's "three stream" model of policy formation (Kingdon, 1995).

It is clear to me from my research that the Oregon Department of Corrections either directly through direct court rulings, or indirectly through legal precedent, utilizes a "fourth stream" policy formation process. Due to financial constraints and a lack of bed space caused by a large influx of inmates over the last decade, the Oregon Department of Corrections has been utilizing penal policy that – in one form or another – involves the interstate import and export of prisoners. Though I do not have the room here to review the normative or scientific literature regarding the effects of out-of-state incarceration on the children and families of exported offenders over the long term, it is safe to assume that Oregon's policy of exporting prisoners via the Interstate Compact mechanism is damaging to Oregonian families. In an illuminating exhibit of administrative means-ends disconnect, Dr. Ben DeHaan, (formerly the Deputy Director of Oregon Corrections) failed to include out-of-state transfers in his research and analysis of the effects of incarceration on the children of inmates (see Appendix B in reference to his public presentation generally).

Similarly, it is very clear that the prison financing strategies utilized by the Oregon Department of Corrections will eventually have a severe and negative impact on the state budget and thus, other essential state services (as evidenced by the onset of a fourth emergency legislative session during the summer of 2002, compelled by Oregon's need to find a way to fund its school system during the next biennium). Potentially disturbing to me about the "fourth stream" policy formation process utilized by the Oregon Department of Corrections is its ability to produce socially unjust and/or fiscally irresponsible public policy with an astounding regularity. In short, the "fourth stream"

would appear to be patently undemocratic and reserved exclusively for defective policy. That is, the “fourth stream” – immune as it is from democratic or constitutional norms and professional critique in the policy formation process – is a stream in which hidden participants are able to utilize defective public policy. Simply, by utilizing the “fourth stream” policy formation process, hidden participants in Oregon corrections are able to bypass the democratic process, avoid damaging political fallout from more humane corrections policy, and have effectively detached the means they use to achieve goals from the value-rich ends for which they were empowered to achieve. Furthermore, the repeated adherence to a “fourth stream” policy formation process indicates a desire by Oregon’s corrections administrators, as well as the high courts, to do what is politically expedient rather than what is humane and rational, or even constitutional in some cases. As evidenced by a recent proposal from an Oregon legislator to “hot bunk” inmates (i.e., double bunk inmates so that they are forced to take turns sleeping) (Sarabi, 2002) or the legal notion that it is constitutional to ship inmates overseas (*Olim v. Wakinekona*, 1983), there is, clearly, an alarming amount of damage that can be caused by an over reliance on the “fourth stream” policy formation process by public administrators.

References

- Boyd, Donald J., & Jenny, Nicholas W. (April 2002). The growth in state prison populations continues to slow. *The Rockefeller institute state fiscal news*, 2 (5) 1-3.
- Criminal Resource Manual – Interstate Agreement on Detainers: October 1997* [Data File]. U.S. Department of Justice.
- Department of Corrections Institutions; Compacts, Chapter 421, ORS (2001)
- Ghana v. Pearce, No. 97-35588, (9th Cir. November 5, 1998).
- Davis v. Hudson, No. 00-6115, (10th Cir. August 4, 2000).
- Friendly, F. W. & Elliot, M. J. H. (1984). *The Constitution: That delicate balance*. New York: Random House.
- Gillman, H. (2001). *The votes that counted*. Chicago: The University of Chicago Press.
- Hallinan, J.T. (2002, May 1). A charity lends prison world hand on off-books deals. *The Wall Street Journal*, p. A9.
- Hogan, W.W., Hitt, C.C., & Schmidt, J. (1996, June 6). Governance structures for an independent system operator (ISO). Background paper prepared by the Harvard Electricity Policy Group and presented at the Center for Business and Government, John F. Kennedy School of Government, Harvard University, Cambridge, Mass.
- House Bill 2393, 71st Oregon Legislative Assembly (2001) (enacted).
- Kennedy, R. (2001, January 1-15). Contempt of court. *The American Prospect*, 15-17.
- Kingdon, J. W. (1995). *Agendas, alternatives and public policies* (2nd ed.). New York: Longman.

Larabee, M. (2002, May 24). Governor an unlikely advocate for legalizing marijuana.

The Oregonian, p. C4.

Lilly, R.J., & Deflem, M. (1996). Profit and penalty: An analysis of the corrections-commercial complex. *Crime and Delinquency*, 42(1). 3-20.

Lockyer, B. & Gonot, Gregory L. (1999). *Opinion of Bill Lockyer: Attorney General for the state of California*. Unpublished opinion regarding inmate placement.

Miller, S. (1998). A note on the banality of evil. *Wilson Quarterly*, Autumn. 1-4.

Olim v. Wakinekona, 461 U.S. 238 (1983).

Parole; Post-Prison Supervision; Work Release; Executive; Clemency; Standards for Prison Terms and Parole; Presentence Reports, Chapter 144, ORS (2001).

Peretti, T.J. (1999). *In defense of a political court*. New Jersey: Princeton University Press.

Segal, G. F. (2001). *Innovation alternatives to traditional municipal/county corrections*.

RPPI E-brief. Retrieved May 2, 2002 from <http://www.rppi.org/ebrief113.html>

Slater v. McKinna, No. 99SA224, (Colorado Supreme Court, April 10, 2000).

The Council of State Governments. (n.d.). *Interstate compact for adult offender supervision*. Retrieved April 17, 2002, from

<http://www.statesnews.org/clip/policy/isc.htm>

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.

(2000). *A second look at alleviating jail overcrowding: A systems perspective*.

[Monograph].

Appendix A: Research Record

Interviewed:*Legislator:*

John Minnis (R), Chair of the Interim Senate Budget Committee Hearing on Public Safety and Corrections, 71st Legislative Assembly of the Oregon Legislature.

Activist:

Bridget Sarabi, Director of the Western Prison Project.

Public Officials:

Suzanne M. Porter, Corrections Population Forecasting Analyst, Office of Economic Analysis.

Dr. Ben DeHaan, Oregon Department of Corrections (during direct questioning at his Portland State University presentation entitled, The effects of parental incarceration on children: Policy implications for practitioners, February 21, 2002).

Attended:

71st Legislative Assembly, Interim Senate Budget Committee Hearing on Public Safety and Corrections, May 9, 2002 at Portland State University.

Reviewed:

Senate Budget Committee, 5/9/02 – Back Ground Information [packet], prepared by the Legislative Fiscal Office.

1. Public Safety / Judicial Program Area: Budget Driver Background Information
2. Oregon Department of Corrections: 2001-03 Legislatively Approved Budget of All Funds; Budget by Division (to include 1999-01 budget); April 2002 Prison Population Forecast – Men; Amount of Earned Time and Recidivism.

3. Boyd, Donald J., & Jenny, Nicholas W. (April 2002). The growth in state prison populations continues to slow. *The Rockefeller institute state fiscal news*, 2 (5) 1-3.
4. Corrections population forecast; Oregon youth authority forecast: Sources of population growth.

Policy Reports prepared by Western Prison Project:

1. Oregon's prison system: Financial & construction overview.
2. Dollars and sense: Re-thinking Oregon's prison build-up.

Interstate Compact Resolutions [letter form] prepared by 6 groups:

1. Bill Owens, Governor of the State of Colorado in a letter to Morris Thigpen, Executive Director of the National Institute of Corrections, dated January 28, 2000.
2. Susan Herman, Director of The National Crime Center for Victims of Crime in a letter to Morris Thigpen, dated March 21, 2000.
3. Richard J. Billak, Ph.D., president of International Community Corrections Association in an open letter to the organizations membership, dated March 10, 1999.
4. American Corrections Association (ACA) in an unsigned, open letter to its membership, dated January 1999.
5. American Probation and Parole Association in an unsigned, open letter to its membership, dated November 1999.
6. The Council of State Governments in an unsigned, open letter to the CSG Annual Meeting and State Leadership Forum, dated December, 1999.

Relevant legislation:

1. HB 2393; Enacting [the] interstate compact for adult offender supervision.
2. Oregon Revised Statutes: Chapter 144 and Chapter 421.

References:

Hallinan, J.T. (2002, May 1). A charity lends prison world hand on off-books deals.
The Wall Street Journal, p. A9.

Appendix B: Key Interview Transcripts

*(Note: Excerpts marked with an * have been paraphrased.)*

*Answers recorded below are in response to my questions regarding Oregon's use of
Interstate Corrections Compacts*

– Senate Budget Committee Hearing - May 9, 2002, at Portland State University:

John Minnis, State Senator (R), 71st Legislative Assembly – Chair, Interim Senate Budget Committee Hearing (Corrections – Public Safety).

Statement 1: “Oregon is the largest net exporter of prisoners in the country”.

Statement 2: * Interstate compacts make it easier to apprehend and legally transport offenders who have left the state of Oregon.

Statement 3: * Anecdotal story of an offender (parole violator) who left Oregon to live in Arizona, a non-participating compact partner, who could not be retrieved because it is too expensive and troublesome to extradite (through traditional methods) such a low priority offender.

Statement 4: * HB 2393 will strengthen our ability to “compact” with other states by strengthening Oregon’s contractual agreement with other compacting states.

Suzanne M. Porter, Corrections Population Forecasting Analyst, Office of Economic Analysis.

Statement 1: “[We use Interstate Compacts] as a form of punishment [in some cases].”

Statement 2: * Interstate compacts are utilized to get rid of “trouble makers” within the correctional system.

Statement 3: * Anecdotal story of a man who was “compacted” out to various prison

systems (including the Federal system) because he complained too much about needing dentures and other “mundane” or “non-essential” personal requirements.

Statement 4: * Interstate Compacts do not necessarily offset prison expenses – “compacting” is usually done on a “one-for-one” basis [trade] with other state’s corrections systems. (This notion was contradicted by Senator Minnis who claims that Oregon is the largest net exporter of prisoners in the country.)

Various statements/concepts expressed by hearing participants:

Statement 1: *Measure 11 promotes efficiency in the Criminal Justice System by forcing the system to become more efficient and creative in managing its resources.

Statement 2: *Measure 11 stabilizes forecast numbers (though forecasting in Oregon is not done very well nor has it been given much priority until now).

Statement 3: *Forecasting methodology is unclear.

In response to my queries regarding Interstate Compacts – Interview with Bridget

Sarabi, activist and organizer, Western Prison Project, April 9, 2002:

Statement 1: * Interstate compacts and contracts: The practice of contracting out large batches of prisoners to “low-bidding” correctional facilities in other states have been disallowed by the legislature due to abuses (though they can authorize this practice again at any time). However, “compacting” prisoners on a case-by-case basis is still allowed.

Statement 2: * Previously, Oregon “sold” large batches of prisoners to other states due to

a lack of prison space caused by Measure 11. However, Oregon has embarked on a \$1 billion dollar + prison expansion project over the next two years in order to accommodate the exponentially growing prison population.

Statement 3: * Interstate compacts are used to get rid of “troublemakers”, dangerous prisoners, or exchange prisoners so that prisoners will be in their home states (very rare). Primarily used for internal safety or political concerns.

Statement 4: * Conditions that may stop prison transfers – prison construction within Oregon and a repeal of Measure 11.

Statement 5: * Issues that will perpetuate the use of Interstate Compacts and reinvigorate prisoner “sales” (i.e., provide impetus for the Oregon Legislature to allow “batch” transfers to other low-bidding states):

1. A lack of prison space.
2. More retributive laws.
3. Budget cutting (which will also open the door to private prisons). Cost Factor.

Statement 6: *Problems upcoming – “Hot bunking”, which is the practice of forcing prisoners to share a bunk for sleeping (eight hours “on”, eight hours “off”), is being considered by some legislators as a way to save money. That is, the doubling –up of inmates in one bunk will allow more prisoners to be placed within an institution.

In response to my question regarding Oregon’s practice of sending prisoners to Angola Prison, Louisiana – At Portland State University on February 21, 2002:

Dr. Ben DeHaan, Oregon Department of Corrections during a presentation entitled, “The Effects of Parental Incarceration on Children: Policy Implications for Practitioners”, on February 21, 2002, at Portland State University.

Statement 1: Laughter (as well as laughter throughout the room).

Statement 2: (In response to my clarification that I did not mean Angola, *Africa*): “Yes, we do send prisoners to Angola [Louisiana] in rare circumstances.”